

Legal Ethics and Special Education Disputes  
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Session 2 of 2  
Thomas Mayes, Iowa Department of Education

## “Pro Se Parties and Lay Advocates Under the IDEA”

### I. Pro Se Parents Who Are Attorneys

The law provides that a court may award “reasonable attorney fees” to parents who are prevailing parties in actions under the IDEA. 20 U.S.C. § 1415(i)(3)(B).

Question: Are parents who represent their children in IDEA disputes and who are also attorneys entitled to reasonable attorney fees, if they “prevail”? The weight of the authority is “no.” See, e.g., *Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087 (9th Cir. 2006); *Woodside v. School Dist. of Philadelphia*, 248 F.3d 129 (3d Cir. 2001). For a student article stating that *Woodside*, *Ford*, and related cases are wrongly decided, see Justin D. Kumpulanian, Note, *Special Education/Civil Procedure – The Idea Of Fairness: Allowing Parent-Attorneys To Recover Their Attorneys' Fees Under The Individuals With Disabilities Education Act*, 31 W. New Eng. L. Rev. 203 (2009).

### II. Pro Se Parents Who Are Not Attorneys: Authority to Appear

In *Winkelman v. Parma City School District*, 550 U.S. 516 (2007), the Supreme Court held that the IDEA created personal rights that parents could enforce. Since the rights under the IDEA belonged to parents and children, the Court held that parents could present their claims under the IDEA as pro se litigants. The Court declined to follow lower court cases holding that lay parents were not authorized to represent their children in litigation under the IDEA. See, e.g., *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3rd Cir. 1998); *Devine v. Indian River County Sch. Dist.*, 121 F.3d 576 (11th Cir. 1997).

Questions: Is the *Winkelman* case in harmony with, or an exception to, the general rule prohibiting practice of law by lay persons? See Model Rule of Professional Conduct 5.5. Could it be both? Based on *Winkelman* decision’s language, can one tell?

Question: Does *Winkelman* extend to other causes of action related to a parent’s IDEA claims? The emerging answer is “no.” *Woodruff v. Hamilton Township Pub. Schs.*, 305 Fed. Appx. 833 (3rd Cir. 2009) (state civil rights act, procedural due

process, common law tort); *Peters v. Guajome Park Academy Charter Sch.*, 290 Fed. Appx. 49 (9th Cir. 2008) (§ 1983).

Question: May a non-attorney parent represent a deceased child's estate in an IDEA reimbursement action? *Malone v. Nielson*, 474 F.3d 934 (7th Cir. 2007) (no, where the parent was not the estate's sole beneficiary) (Illinois law).

### III. Pro Se Parents Who Are Not Attorneys: Conduct of Litigation

In their conduct of litigation, to what extent should courts and administrative tribunals hold pro se litigants to rules of procedure and substantive rules of law?

One line of cases holds that pro se litigants are held to the same rules as litigants who are represented by counsel [see, e.g., *Stueber v. Gallagher*, 812 So.2d 454 (Fla. Dist. Ct. App. 2002) (error preservation)] and that courts are not to assume the role of advocate for pro se litigants or fill in gaps in evidence or pleading [see, e.g., *Trujillo v. Board of Educ.*, 377 F. Supp. 2d 994 (D.N.M. 2005)].

Another line of cases holds that pro se litigants are entitled to leniency and that their pleadings and evidence are entitled to a broad construction. See, e.g., *Jeter v. New York City Dep't of Educ.*, 549 F. Supp. 2d 295 (E.D.N.Y. 2008).

Questions: Are these two "lines" of cases in opposition? May they be harmonized? If so, how? Where is the line between a "liberal construction" and "assuming the role of an advocate"? See *Wanham v. Evert Pub. Schs.*, 515 F. Supp. 2d 175 (D. Mass. 2007), *as amended*, 550 F. Supp. 2d 152 (D. Mass. 2008).

Some states have rules requiring ALJs to develop records in administrative hearings. See, e.g., *Baker v. Employment Appeal Board*, 551 N.W.2d 646 (Iowa Ct. App. 1996). Questions: When does developing the record stop and assuming a partisan role start? The develop-the-record duty is derived from Social Security hearings, which operate under an inquisitorial model. To what extent is that duty even appropriate in adversarial proceedings, such as unemployment insurance contested cases (*Baker*) or IDEA matters?

Lawyers have certain duties to unrepresented opposing parties. See Model Rule 4.3. Questions: To what extent do the Model Rules (whether Rule 4.3 or otherwise) require attorneys to assist unrepresented adverse parties? At what point would the Rules prohibit providing assistance to unrepresented adverse parties?

#### IV. Lay Advocates and the IDEA

The IDEA regulations, as amended in 2008, contain the following right of parties to due process cases.

*Be accompanied and advised* by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be *represented* by non-attorneys at due process hearings is determined under State law

34 C.F.R. 300.512(a)(1) (emphasis added). State may prohibit representation by lay advocates, as some already have done. *See, e.g., In re Arons*, 756 A.2d 867 (Del. 2000). Note that this rule is not limited to parents. Public agencies may be “accompanied and advised,” too. Questions: Is this rule allowing unauthorized practice of law commissions to prohibit lay advocates from “representing” parents at due process hearings good public policy? “Parent-friendly”? Why? *See* Kay H. Seven & Perry A. Zirkel, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 Georgetown J. On Poverty L. & Pol’y 193 (2002). In the absence of a rule prohibiting or permitting lay advocates to “represent” parties, does the ALJ have discretion to restrict non-attorney representation?

Questions: May states, in enforcing their unauthorized practice of law statutes, prohibit lay advocates from “accompanying and advising” parents? In its comments to the draft of the 2008 regulations, Iowa said “no,” and OSEP agreed. OSEP stated that the right to be “accompanied and advised by” is absolute: “Nothing in these regulations or State law can limit this right.” IDEA Final Regulations, 73 Fed. Reg. 73,005, at 73,017 (Dec. 1, 2008). Since the IDEA draws a line, where is the line between “representation” and “accompany and advise”? Who draws the line: the SEA, the ALJ, or the unauthorized practice commission? Could the SEA “authorize” additional activities by lay advocates by special education rule that unauthorized practice rules would otherwise prohibit? OSEP’s view is that is a matter of state law. *Id.*

Hypothetical: A lay advocate participates in a due process hearing. Consistent with state unauthorized practice rules, he does not examine witnesses; however, the lay advocate’s client seeks the advocate’s “advise” before asking each question. Is this “advice” or “representation”? Where is the line between the two? Who decides?